OPINIONS BELOW.

The majority opinion of District Judges Steckler and Dillin and the dissenting opinion of Circuit Judge Stevens, which are set out in Appendix A, *infra,* pp. A1 to A19, are not yet reported.

JURISDICTION.

Appellee R. Vance Hartke instituted this action under 28 U. S. C. § 1343(3) for interlocutory and permanent injunctions restraining and enjoining the recount commissioners appointed by the Superior Court of Marion County, Indiana, Room 3, from convening and commencing a recount and restraining and enjoining appellant Richard L. Roudebush from taking any actions to effect recount procedures under the Indiana Election Code on the ground that, insofar as the Indiana Election Code establishes a procedure for a recount of the votes cast for the office of United States Senator, it conflicts with the provisions of Article 1, § 5, of the Constitution of the United States.

On December 17, 1970, appellee Hartke's request for an interlocutory injunction was heard by a three-judge district court convened pursuant to 28 U. S. C. §§ 2281 and 2284, and on a 2-1 vote the request was granted. A notice of appeal to this Court was filed in the United States District Court for the Southern District of Indiana, Indianapolis Division, on December 18, 1970. A copy of the order granting the interlocutory injunction is set out in Appendix B, *infra,* pp. A20 to A22, and a copy of the notice of appeal is set out in Appendix C, *infra,* pp. A23 to A24.

The jurisdiction of this Court to review the order granting the interlocutory injunction is conferred by 28 U. S. C. § 1253.

Cases believed to sustain the jurisdiction of this Court to review the decision below on direct appeal are *Baker* v.

Carr, 369 U. S. 186 (1962), and *Williams* v. *Rhodes*, 393 U. S. 23 (1968).

The statute of Indiana whose validity is involved is Article 27 of the Indiana Election Code, Acts 1945, Chapter 208, page 680, at pages 883 to 890, as amended by Acts 1961, Chapter 313, page 861, at pages 862 to 866. Said Article 27 of the Indiana Election Code, as it appears in Burns' Indiana Statutes, §§ 29-5401 through 29-5417, is set forth in Appendix D, *infra*, pp. A25 to A35.

QUESTIONS PRESENTED.

1. Whether the interlocutory injunction appealed from is prohibited by the plain language of 28 U. S. C. § 2283.

2. Whether Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, conflicts with the provisions of Article 1, § 5, of the Constitution of the United States, which provides that "'Each house shall be the judge of the elections, returns and qualifications of its own members."

3. Whether, as a matter of law, no irreparable damage would have resulted to appellee Hartke if the interlocutory injunction had not been granted.

STATEMENT OF THE CASE.

Appellant Roudebush and appellee Hartke were candidates for the office of United States Senator at the general election held in the State of Indiana on November 3, 1970. The official canvass of the votes cast showed appellee Hartke to be the winner by 4,283 votes.

Pursuant to Article 27 of the Indiana Election Code (Appendix D, *infra*), appellant filed petitions in the circuit or in a superior court of the counties of Marion, Lake,

Porter, St. Joseph, Vigo, Pike, Clark, Wayne, Grant, Ripley and Madison on or about November 17, 1970, wherein he requested a recount of the votes cast for the office of United States Senator in certain specified voting precincts in such counties. Appellee Hartke appeared in each of the proceedings and filed a motion to dismiss wherein he contended that the various courts lacked jurisdiction over the subject matter because of the alleged conflict of Article 27 of the Indiana Election Code with Article 1, § 5, of the Constitution of the United States. Prior to the filing by appellee Hartke of his complaint for injunctive relief in the court below, the Superior Court of Marion County, Room 3, and the Lake Circuit Court had each denied appellee Hartke's motion to dismiss. Appellees Samuel Walker, John R. Hammond and Duge Butler are the recount commissioners appointed by the Superior Court of Marion County, Room 3.

On December 3, 1970, appellee Hartke filed his complaint in the court below wherein he alleged that Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, conflicts with the provisions of Article 1, § 5, of the Constitution of the United States. The complaint prayed that a three-judge district court be convened pursuant to 28 U. S. C. § 2284 to hear and determine the action and that interlocutory and permanent injunctions be issued restraining and enjoining appellees Samuel Walker, John R. Hammond and Duge Butler from convening and commencing a recount and restraining and enjoining appellant Roudebush from taking any actions to effect recount procedures under the Indiana Election Code. Upon the filing of the complaint, District Judge S. Hugh Dillin entered a temporary restraining order without notice. On December 11, 1970, appellee Hartke filed an amended com-

plaint that included additional prayers for declaratory relief as alternatives to the prayer for injunctive relief.

On December 15, 1970, appellee Theodore L. Sendak, Attorney General of Indiana, was granted leave to intervene as a defendant, and he filed a motion to dismiss the complaint.

On December 16, 1970, appellant Roudebush filed a motion to vacate the temporary restraining order on the ground that it was issued in violation of 28 U. S. C. § 2283, and a motion to dismiss the action on the grounds (1) that the court lacked jurisdiction of the subject matter and (2) that the complaint failed to state a claim against appellant upon which relief could be granted.

On December 17, 1970, appellee Hartke's request for an interlocutory injunction was heard by a three-judge district court composed of District Judges William E. Steckler and S. Hugh Dillin of the United States District Court for the Southern District of Indiana and Circuit Judge John P. Stevens of the United States Court of Appeals for the Seventh Circuit. By a 2-1 vote, Circuit Judge Stevens dissenting, the court held Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, to be unconstitutional and issued the interlocutory injunction requested by appellee Hartke.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

I. The Interlocutory Injunction Appealed From Is Prohibited by 28 U. S. C. § 2283.

The Anti-Injunction Act, 28 U. S. C. § 2283, provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Despite the plain language of the foregoing statute, the court below did enjoin the election recount proceedings pending in the Superior Court of Marion County, Indiana, Room 3, and further enjoined the appellant from taking any action elsewhere to obtain a recount of votes, thereby staying proceedings pending in state courts located in ten additional Indiana counties. The court made no attempt to justify the injunction as falling within one of the three specific exceptions defined in the Act. Instead, it held that the Act was discretionary in its application, saying:

> "* * * One view, which we find persuasive, is that Section 2283 is not a jurisdictional statute, but is rather, in essence, a statutory adoption of the doctrine of comity and hence discretionary in its application. In spite of its absolute language, it does not prevent a federal court from enjoining state court proceedings where special circumstances justify such relief. * * *" (Appendix A, *infra*, p. A5)

Such a view of the Anti-Injunction Act has been expressly rejected by this Court. *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U. S. 281 (1970); *Amalgamated Clothing Workers* v. *Richman Brothers*, 348 U. S. 511 (1955). In *Atlantic Coast Line* it was expressly held "that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld."

The court below also noted the theory stated in *Cooper* v. *Hutchinson*, 184 F. 2d 119 (3rd Cir. 1950), that the mention in 42 U. S. C. § 1983 of a "suit in equity" constitutes the express authorization by an Act of Congress required by 28 U. S. C. § 2283 for an injunction against proceedings pending in a state court. (Appendix A, *infra*, pp. A12 to A13) Although the complaint below alleges that the court has jurisdiction pursuant to 28 U. S. C. § 1343(3), it is not

alleged that the action below is authorized by 42 U. S. C. § 1983. Indeed, appellee Hartke could not base his action upon 42 U. S. C. § 1983, because the rights, privileges and immunities protected by 42 U. S. C. § 1983 are those guaranteed by the Fourteenth Amendment. *Monroe* v. *Pape*, 365 U. S. 167 (1961). Inasmuch as the complaint alleges that the recount provisions of the Indiana Election Code conflict with Article 1, § 5, of the Constitution of the United States, the jurisdiction of the district court can be sustained only under 28 U. S. C. § 1331(a), if at all. *Powell* v. *McCormack*, 395 U. S. 486 (1969). Since 28 U. S. C. § 1331(a) contains no provision expressly authorizing an injunction to stay proceedings in a state court, and since the injunction issued was not necessary in aid of the court's jurisdiction, or to protect or effectuate its judgments, it results that the injunction appealed from is prohibited by 28 U. S. C. § 2283.

II. Article 27 of the Indiana Election Code Is Constitutional.

The holding of the court below that Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, is unconstitutional presents a question that is manifestly substantial.

Article 1, § 4, of the Constitution of the United States provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." The only regulations that the Congress has made governing the election of senators and representatives are set forth in 2 U. S. C. §§ 1 through 9. With respect to the election of senators, the Congress has specified only the time

for election and the manner of certification. All other aspects have been left to the States. In the Indiana Election Code, provision has been made covering all phases of the election of a United States Senator from the nomination of party candidates for the office at state conventions (Burns' Indiana Statutes § 29-3703) through the right to have a recount of the vote after the election. (§ 29-5402)

On the other hand, while the Indiana Election Code makes provision for the contest of elections to certain offices, viz. Burns' Indiana Statutes §§ 29-5501 through 29-5508 and §§ 29-5601 through 29-5617, no provision is made for the contest of the election of a United States Senator. The reason for the omission is obvious, because exclusive jurisdiction is vested in the Senate by Article 1, § 5, of the Constitution of the United States, which provides that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members."

In holding that Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, is in conflict with Article 1, § 5, of the Constitution of the United States, the court below has misread the provision of the Constitution upon which it relies. It says that each house shall be the *judge* of the elections, returns and qualifications of its own members. It does not say that each house shall *count* the votes cast at such election. Indeed, if the district court's position that Article 1, § 5, forbids a recount of votes for members of the United States Senate were to be accepted, then it logically follows that it forbids the initial count of such votes as well. The state's jurisdiction would end once the polls were closed, and the Senate would have to tally the vote. But merely to state the proposition demonstrates its absurdity.

Article 1, § 4, of the United States Constitution, which provides that the times, places and manner of holding elec-

tions for senators and representatives shall be prescribed in each state by the legislature thereof, and Article 1, § 5, which provides that each house shall be the judge of the elections, returns and qualifications of its own members, are in *pari materia* and must be construed with reference to each other. Until the election conducted pursuant to Article 1, § 4, has been concluded, the power to judge the result thereof under Article 1, § 5, does not come into play.

The court below clearly erred in equating a proceeding for a recount provided as an integral step in the election process with a contest. There is an essential difference between a statutory recount and a contest. A recount proceeding involves no more than a ministerial recounting of the votes cast. The recount certificate is not an adjudication of the title to the office, but only *prima facie* evidence of the votes cast for the office. Burns' Indiana Statutes § 29-5414. By contrast, in order to contest an election, some cause must be alleged, such as malconduct, ineligibility, bribery or illegality. The purpose of the proceeding is to finally determine the rights to the office by permitting both parties to present evidence to support their contentions.

The Supreme Court of Indiana has never passed on the validity of Article 27 of the Indiana Election Code as it applies to elections of United States Senators and Representatives. However, the trend of recent authority in other states is to uphold the constitutionality of recount statutes in such elections. *Wickersham* v. *State Election Board,* 357 P. 2d 421 (Okla. 1960); *Blackburn* v. *Hall,* 115 Ga. App. 235, 154 S. E. 2d 392 (1967); *accord, Rice* v. *Power,* 19 N. Y. 2d 106, 224 N. E. 2d 865 (1967); see *Odegard* v. *Olson,* 264 Minn. 439, 119 N. W. 2d 717 (1963) (concurring opinion of Knutson, *C. J.*); *Laxalt* v. *Cannon,* 80 Nev. 588, 397 P. 2d 466 (1964); *Comment, Congressional*

Election Contests and Recount Proceedings: A Critical Difference, 72 Dickinson L. Rev. 433 (1968).

In the light of the foregoing authority, it is clear that Article 27 of the Indiana Election Code is valid and constitutional as applied to the election of a United States Senator.

III. No Irreparable Damage Was Threatened.

In order to find irreparable damage to justify the issuance of an interlocutory injunction, the majority of the district court reasoned that appellee Hartke has a constitutional right to have the United States Senate act as sole judge of the Indiana election returns, that it is essential to this right that the integrity of the election materials be preserved so that no question may arise as to the character of the evidence that the Senate will be called upon to judge, and that appellee Hartke's rights will be irreparably harmed if such evidence is compromised, for which there can be no adequate remedy at law. The supposed irreparable damage that the court thought justified the granting of the injunction is as follows:

> "* * * The harm to be avoided will take place immediately, if not enjoined. Like Humpty Dumpty, the seals on the ballots cannot be put back together again, if once destroyed, hence the frequent reason given for abstention—that all can be made right through state appellate procedures—does not apply." (Appendix A, *infra,* pp. A14 to A15.)

But the breaking of the seals on the ballot bags and voting machines does not mean that the integrity of the election materials will be compromised. After the recount has been completed, new seals can be affixed. As observed by Circuit Judge Stevens in his dissenting opinion, "the evidence establishes without contradiction that the Indiana recount procedures have integrity, that the original ballots

and other records are carefully preserved for future study, that an adequate record of what transpires during a recount is maintained, and that any judgment as to whether or not certain categories of ballots (or even individual ballots) should be counted, may be reviewed subsequently by the body having the power finally to resolve an election contest." (Appendix A, *infra*, p. A18) In this regard, Burns' Indiana Statutes § 29-5411 provides that "each candidate affected by such recount shall be entitled to have a watcher present at such recount and shall himself have the right to be present," and that "representatives of the press shall also be entitled to attend such recount." In addition to this, Burns' Indiana Statutes § 29-5413 makes it the duty of the court in which the recount petition is filed to provide by order for the protection of all ballots and voting machines together with all tally sheets relating thereto and all lists of the names and addresses of all persons registered by the clerk as having voted for such office or offices. (Appendix D, *infra*, pp. A30 to A31)

The conclusion of the district court that appellee Hartke will sustain immediate and irreparable damage if the seals on the ballot bags and voting machines are broken is unsupported either by fact or by law.

SHOWING OF ABUSE OF DISCRETION.

In granting the interlocutory injunction appealed from, the district court abused its discretion in the following matters:

1. Since the complaint seeks to stay proceedings in a state court in violation of 28 U. S. C. § 2283, the district court's lack of jurisdiction is evident upon the face of the complaint. *United States* v. *Corrick*, 298 U. S. 435 (1936).

2. The opinion of the district court holds Article 27 of the Indiana Election Code unconstitutional with respect to

the office of United States Senator. The court thereby committed serious error in thus dealing with the case upon application for an interlocutory injunction, since that question was not then before it. *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310 (1940).

3. The statements of fact contained in the court's opinion mingled with arguments and inferences do not constitute a fair compliance with Rule 52(a) of the Federal Rules of Civil Procedure. The court was required to make explicit findings of fact regarding the irreparable damage that would be sustained by appellee Hartke if the proceedings in the state courts were not stayed. *Mayo* v. *Lakeland Highland Canning Co.*, 309 U. S. 310 (1940).

4. No showing was made why appellee Hartke could not have obtained relief in the pending state court proceedings or from the Supreme Court of Indiana.

5. As a matter of law, no irreparable damage would have resulted to appellee Hartke if the interlocutory injunction had not been granted.

CONCLUSION.

For the foregoing reasons, probable jurisdiction should be noted and the appeal set for an early hearing.

Respectfully submitted,

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APPENDIX A.

OPINIONS BELOW.

UNITED STATES DISTRICT COURT,
Southern District of Indiana,
Indianapolis Division.

VANCE HARTKE, *Plaintiff,*
vs.
RICHARD L. ROUDEBUSH, SAMUEL J. WALKER, JOHN R. HAMMOND, DUGE BUTLER, *Defendants,*
THEODORE SENDAK, Attorney General of Indiana, *Intervening Defendant.*

No. IP 70-C-694.

OPINION.

This cause was heard before a three-judge District Court convened pursuant to 28 U. S. C. § 2284, on plaintiff's application for a preliminary injunction to enjoin the operation and enforcement of Chapter 54 of Title 29 of the Indiana Election Code, Burns Ind. Stat. Ann. § 29-5401 through § 29-5417, upon the ground that the application and operation of such statutes in respect to an election for the office of United States Senator is unconstitutional.

At the general election of November 3, 1970, the plaintiff, Vance Hartke, an incumbent United States Senator for Indiana, and the defendant Richard L. Roudebush were opposing candidates for Hartke's office. The canvass reflected that Hartke received the highest number of votes cast for such office, and on November 16, 1970, the Secretary of State certified him to the Governor of Indiana as duly elected and the Governor, on December 3, 1970, gave to said candidate a certificate of his election, in the form required by Burns Ind. Stat. Ann. § 29-5309.[1] The certificate has been filed with the Secretary of the United States Senate.

On November 17, 1970, defendant Roudebush filed in the Superior Court of Marion County, Indiana, a petition for a recount of the votes cast in selected precincts of Marion County, stating in said petition his desire to contest said election. This court knows judicially that similar petitions were filed by him in ten other counties of the State of Indiana. The Superior Court of Marion County overruled a motion to dismiss the petition, and proceeded to appoint the defendants Samuel J. Walker, John R. Hammond, and Duge Butler as a recount commission to recount the votes cast for the office of United States Senator in such selected

1. Section 29-5309. "The secretary of state as soon as he shall receive such certified statements, shall compare and estimate the votes given for United States senator and for representative in Congress, and certify to the governor the persons having the highest number of votes as duly elected; and the governor shall give to each of the persons returned to him as aforesaid a certificate of his election, sealed with the seal, and attested by the secretary of state: Provided, That no return of any county which has come into its hands, and which has been duly authenticated by the clerk of the circuit court thereof, under seal, as hereinbefore provided shall be rejected by said secretary of state, but he shall estimate, aggregate and tabulate, and report to the governor the total number of votes cast in each county for each candidate for state office, supreme judge or other officer to be elected by all the voters of the state, and members of congress, as evidenced by the face of such returns so certified to him."

precincts of Marion County, relying upon the Indiana recount statute, Burns Ind. Stat. Ann. §§ 29-5401—29-5417, the pertinent parts of which are set out below.[2] Said recount was ordered to be commenced on December 8, 1970.

2. Section 29-5401. "Any candidate for any public office voted upon at any election held within the state of Indiana shall have the right to have the votes cast for the office for which he was a candidate recounted in any voting precinct or precincts in any county or counties, as the case may be, under the conditions and in the manner and with the effect as in this article [§§ 29-5401—29-5417] provided."

Section 29-5402. "The right of recount provided in this article [§§ 29-5401—29-5417] shall be available to any candidate for any public office without exception and including specifically, but without limiting the generality of the foregoing, all candidates for any township, town, city, municipal, county, district, judicial, legislative, and state elective office and candidates for membership in the house of representatives and in the senate of the United States; and such right of recount may by any candidate be exercised with respect to one [1] or several or all of the voting precints in which votes were cast for the office for which he was a candidate."

Section 29-5405. "Each such petition shall state the office and the precinct or precincts within the county in respect of which the petitioner desires a recount; . . . that the petitioner in good faith believes that either through mistake or fraud the votes cast for such office at such election in such precinct or precincts were not correctly counted and returned; that the petitioner desires to contest said election in respect of said office, . . . and that he desires a recount of all of the votes cast for such office in such precinct or precincts. The term 'contest' as used in this section shall include all forms of contest herein or hereafter recognized as appropriate means for contesting title to a public office. . . ."

Section 29-5409. "Upon the filing of such petition and undertaking, the court or the judge thereof in vacation shall, upon the expiration of twenty-five [25] days after such election and upon proof of service of said notice or notices, grant such petition and cross-petition or cross-petitions as may have been filed and order the recount of such votes in such precinct or precincts. . . ."

Section 29-5414. "When such recount is completed by the commission, it shall make and sign its certificate showing the total number of votes received in such precinct or precincts by each candidate for such office or offices and state therein who received the highest number of votes in such precinct or precincts for such office or offices and by what plurality, and shall file the same with the clerk of the circuit court. The clerk shall enter such certificate in the order book of such court.

"(Except for the offices of governor, lieutenant-governor, and

On December 3, 1970, plaintiff Hartke brought this action to enjoin the defendant recount commission from proceeding with the recount in Marion County, and to enjoin the defendant Roudebush generally from taking further action to obtain a recount in the other counties in which his recount petitions were filed. Jurisdiction was predicated on 28 U. S. C. § 1343(3), with request that a three-judge district court be convened to hear the case, pursuant to 28 U. S. C. § 2284. The jurisdiction of a three-judge court over an action in which a candidate for the Congress of the United States alleges the deprivation of a right under color of a state election law, and the unconstitutionality of such law in the light of the Constitution of the United States has been recognized. *Voltaggio* v. *Caputo*, D. N. J., 1963, 210 F. Supp. 337, app. dis., 371 U. S. 232, 83 S. Ct. 325, 9 L. Ed. 2d 494. See also *Socialist Labor Party* v. *Rhodes*,

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members of the general assembly), such recount certificates shall supersede for all purposes all previous returns made in any form of the votes thus recounted; . . ."

Section 29-5415. "If a recount is had in respect to an office for which votes were cast in all voting precincts of the state (except governor and lieutenant-governor), or in more than one [1] county (except members of the general assembly), the clerk of the circuit court where such recount was had shall determine whether the votes as shown by such recount certificates differ from the votes in such precinct or precincts as the same had been returned to, and tabulated by the county canvassing board, and if he finds there is such difference he shall make his certificate showing the total vote in such county for such office for each candidate as corrected in accordance with the votes shown by such recount certificate and shall forthwith transmit the same to the secretary of state . . . and if the secretary of state shall previously have included in his tabulations votes cast for such office as returned by such county canvassing board he shall correct such tabulation, . . . and the candidate shown by such corrected tabulation to have received the highest number of votes for such office shall be entitled to a certificate of election or commission for such office notwithstanding one may have been issued upon a previous tabulation of the total votes cast for such office."

Note: Portions in ( ) added by 1961 amendment, as discussed *infra*.

S. D. Ohio, 1968, 290 F. Supp. 983, aff'd as modified, *sub nom Williams* v. *Rhodes*, 393 U. S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24. This court was properly convened, and has jurisdiction in the premises.

The attorney General of Indiana has been permitted to intervene, pursuant to 28 U. S. C. § 2284(2), and has filed a motion to dismiss the action. The defendant Roudebush has likewise moved to dismiss. An argument common to both motions is that this court lacks jurisdiction to grant injunctive relief, as prayed for, because prohibited by 28 U. S. C. § 2283.[3]

The statute referred to has been characterized as ambiguous, by the Supreme Court of the United States, speaking without dissent. *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220, 77 S. Ct. 287, 1 L. Ed. 2d 267. It is therefore not surprising that various, and to some extent contradictory, interpretations of it have been made. One view, which we find persuasive, is that Section 2283 is not a jurisdictional statute, but is rather, in essence, a statutory adoption of the doctrine of comity and hence discretionary in its application. In spite of its absolute language, it does not prevent a federal court from enjoining state court proceedings where special circumstances justify such relief. *Baines* v. *City of Danville*, 4 Cir., 1964, 337 F. 2d 579, 593. This appears to be particularly true with respect to cases arising pursuant to 42 U. S. C. § 1983, as to which 28 U. S. C. § 1343, under which this suit is brought, is the jurisdictional analogue. *Machesky* v. *Bizzell*, 5 Cir., 1969, 414 F. 2d 283; *Carmichael* v. *Allen*, N. D. Ga., 1967, 267 F. Supp. 985 (three-judge court); *Landry* v. *Daley*, N. D. Ill., 1968, 288 F. Supp. 194; 233. See *Dombrowski* v. *Pfister*, 380 U. S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22.

3. "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Another ground for dismissal urged by the defendant Roudebush is that this court lacks jurisdiction because exclusive jurisdiction to determine the effect of the recount proceedings commenced by him is in the United States Senate by virtue of Article 1, Section 5 of the Constitution of the United States, which provides "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ." But a right claimed under the same Constitutional provision—the right to have the returns of the November 3 election judged by the Senate and not piecemeal by various commissions appointed by various state courts—is the very right which plaintiff asserts is being violated by the defendant Roudebush's state court actions. Regardless of the position taken, all parties agree as to the supremacy of the Senate itself to make the final determination as to the winner of the recent election. *Reed* v. *County Commissioners,* 277 U. S. 376, 48 S. Ct. 531, 72 L. Ed. 924; *Barry* v. *U. S. ex rel. Cunningham,* 279 U. S. 597, 49 S. Ct. 452, 73 L. Ed. 867.

The great weight of authority supports plaintiff's position that court proceedings for recount or contest with regard to an election for representative in the national House of Representatives or for United States Senator are unconstitutional, as in conflict with Article 1, Section 5, whether brought in state or federal court. *State ex rel. Fleming* v. *Crawford,* 1891, 28 Fla. 441, 10 So. 118; *Burchell* v. *State Board of Election Commissioners,* 1934, 252 Ky. 823, 68 S. W. 2d 427; Opinion of the Justices, 1956, 152 Me. 212, 142 A. 2d 532; *Belknap* v. *Board of Canvassers,* 1893, 94 Mich. 516, 54 N. W. 376; *McLeod* v. *Kelly,* 1942, 304 Mich. 120, 7 N. W. 2d 240; *State ex rel. 25 Voters* v. *Selvig,* 1927, 170 Minn. 406, 212 N. W. 604; *Odegard* v. *Olson,* 1963, 264 Minn. 439, 119 N. W. 2d 717; *State ex rel. McCue* v. *Blaisdell,* 1908, 18 N. D. 55, 118 N. W. 141; *Laxalt* v. *Cannon,* 1964, 80 Nev. 588, 397 P. 2d 466; Opinion of the

Justices, 1921, 80 N. H. 595, 113 A. 293; *Smith* v. *Rolk*, 1939, 135 Ohio St. 70, 19 N. E. 2d 281; *Sutherland* v. *Miller*, 1917, 79 W. Va. 796, 91 S. E. 993; *State ex rel. Wettengel* v. *Zimmerman*, 1946, 249 Wis. 237, 24 N. W. 2d 504; *Keogh* v. *Horner*, 1934, S. D. Ill., 8 F. Supp. 933; *Peterson* v. *Sears, et al.*, 1964, N. D. Iowa, 238 F. Supp. 12.

An equally strong body of authority supports the same rule with regard to the lack of jurisdiction in the courts to countenance suits for recount or contest with regard to elections of members of the State legislatures. The reasoning is identical and is predicated on provisions of the various state constitutions which copy Article 1, Section 5 of the Constitution of the United States either verbatim or in substance. We deem it unnecessary to burden this opinion with a collection of these many cases, inasmuch as the Supreme Court of Indiana has had occasion to speak three times in the past twenty years on the subject of legislative recounts, attempted under the statute here involved, Burns Ind. Stat. Ann. §§ 29-5401—29-5417, inclusive.

This trilogy consists of the cases of *State ex rel. Acker, et al.* v. *Reeves*, 1951, 229 Ind. 126, 95 N. E. 2d 838, *State ex rel. Beaman* v. *Circuit Court of Pike County, et al.*, 1951, 229 Ind. 190, 96 N. E. 2d 671, and *State ex rel. Batchelet* v. *DeKalb Circuit Court, et al.*, 1967, 248 Ind. 481, 229 N. E. 2d 798. The provision of the Constitution of Indiana which controlled the cases is Article 4, Section 10, which is virtually identical to Article 1, Section 5 of the Constitution of the United States.[4] In each case, a defeated candidate for the General Assembly of Indiana filed a petition for a recount pursuant to Burns Ind. Stat. Ann. §§ 29-5401—29-5417, in each case the trial court appointed a recount commission, and in each case the Supreme Court of Indiana

4. Article 4, Section 10: "Each House, when assembled, shall . . . judge the elections, qualifications and returns of its own members."

issued a writ of prohibition restraining the court from proceeding with the recount on the ground that it was constitutionally impermissible in the light of Article 4, Section 10.

In order to understand *Acker*, *Beaman*, and *Batchelet*, and, for that matter, our own decision, it is necessary to make plain what the unadorned word "recount" has been taken to mean in Indiana. It will be noted immediately that the statute (Footnote 2) does not specify in what manner the recount shall be conducted; however, we find from the undisputed evidence in the case before us, and in addition know judicially, that by custom, usage and practice recounts in Indiana have been conducted under the statute as follows: (1) with regard to votes registered on voting machines, the machines are inspected by the commission, and the totals checked against the tally sheets and certificates of memoranda as to total votes cast for each office; this operation is purely mechanical and/or mathematical and creates no problems; (2) with regard to votes cast by paper ballot, which includes all of the votes cast in some of the counties of the State of Indiana and a part of the votes cast in all counties of the State, the commission exercises its own judgment, sometimes supplemented by instructions from the court which appoints it, as to which ballots are to be counted and which not counted, and thereby, for all purposes, nullifies and supersedes the judgment of the duly constituted election boards in this regard.

Further, the election laws provide that after tallying the vote, each local election board must place in separate envelopes, clearly marked, all of the ballots which it counted, and all of the ballots which it did not count. Such envelopes are then sealed with wax, to preserve their integrity. The commission necessarily breaks the seals and removes the ballots for the purpose of its recount—or rejudging, as would appear to be more accurate—and reas-

sembles them according to its own determinations, which may well be by 2-1 vote in many instances.

There is no way in which the commission may make a simple mathematical verification of the vote. As illustrative of the problems encountered, a ballot may, under certain circumstances, be valid and countable for one office, but not for another. If counted for any office it is placed in the "counted" envelope; but the commission has no way of knowing how the election board counted it—whether for all offices, or only for some. The main problems, of course, arise with respect to the counting of ballots not absolutely perfect on their face. What is a distinguishing mark? What was the intent of the voter? As the record in the many permissible recount cases, too numerous to cite, all reflect, judgments must constantly be made in determining which ballots to count and which not to count when "recounts" are made under the Indiana recount law.

It was in this context, then, that the Supreme Court of Indiana first confronted the constitutional question as to the jurisdiction of the Indiana courts to appoint recount commissions with respect to an election for a seat in the Indiana House of Representatives. The Court quoted Article 4, Section 10 Indiana Constitution and pointed out its similarity to Article 1, Section 5 United States Constitution. It then quoted with approval from *Lucas* v. *McAfee*, 1940, 217 Ind. 534, 29 N. E. 403, 29 N. E. 2d 588, as follows:

> " 'The right of legislative bodies to judge the elections, qualifications, and returns of their own members is of ancient origin. The history of the doctrine reveals that it was established in the constitutional law of England in the year of 1586, during the reign of Queen Elizabeth. . . .
>
> 'Provisions guaranteeing this right are to be found in the federal Constitution and in the organic law of every state in the Union, in language substantially if

> not identically like that employed in ours. . . . That right is deemed essential to the enactment of legislation without interruption and confusion and to maintain a proper balance of authority where the functions of government are divided between coordinate branches. It is no more subject to judicial interference or control than the judicial functions of this court are subject to the dictates of the legislative or executive departments. The Constitution has defined a domain upon which courts may not tread. Dinan v. Swig, 1916, 223 Mass. 516, 112 N. E. 91.' "

The Court then went on to hold the statute unconstitutional and void to the extent that it purported to apply to members of the General Assembly, and entered its writ of prohibition accordingly.

Beaman, like *Acker*, arose out of the general election of 1950, and was considered at about the same time by the same court. Here original suits were brought in two counties to obtain a recount for the office of Joint State Senator and recount commissions were appointed in each county. The judges of the two courts were again prohibited from proceeding with the recounts. On behalf of respondents, as in the case before us, the argument was made that in carrying out the provisions of the recount statute the courts and their commissions were acting simply in a ministerial capacity. The Court pointed out its recent decision in *Acker*, and held that since the recount statute was unconstitutional as applied to recounts for the legislature, it was, to such extent, void ab initio and inoperative from the time of its passage. Therefore, it reasoned, it could not confer any jurisdiction upon any court either for the performance of judicial or ministerial acts, and hence the appointment of recent commissioners was beyond the lawful jurisdiction of the courts involved.

Also, as here, respondents argued that a recount of votes is not an adjudication of the election or rights to an office

but is only a proceeding in discovery. The Supreme Court rejected this theory also, pointing out the provisions of Section 29-5414, "*Such recount certificates shall supersede for all purposes all previous returns* . . ." (Supreme Court's emphasis), and of Section 29-5415, ". . . the candidate shown by such corrected tabulation to have received the highest number of votes for such office shall be entitled to a certificate of election . . . notwithstanding one may have been issued upon a previous tabulation of the total votes cast for such office." The Court concluded from such provisions that if the effect of the statute was not an adjudication of the election and returns of members of the legislature it approached so nearly thereto "that it may interfere with the constitutional right of each house of the Legislature to judge the elections and returns of its members . . . its effect is more than a mere procedure for the discovery of evidence." Unconstitutionality was reaffirmed.

These decisions put the matter at rest for the next several years. However, in 1961 the General Assembly attempted to bring the law into conformity with the Indiana Constitution with respect to the members of the general assembly and certain other state officers. It did so by inserting the language "Except for the offices of governor, lieutenant-governor, and members of the general assembly" where the same presently appear in Sections 29-5414 and 29-5415 (set out in ( ), Footnote 2), and by adding certain paragraphs to Section 29-5414 to provide that with respect to the general assembly, the results of the recount would be forwarded to the appropriate presiding officer for information only. It will be noted that all of the language found in *Beaman* to constitute a recount "more than a mere procedure for the discovery of evidence" remained untouched as to recounts for the office of United States Senator.

However, the effort to legitimize recounts for the General Assembly failed. In *Batchelet* a recount for State Senator was attempted in the DeKalb Circuit Court under the amended statute, and that Court appointed a recount commission. The recount was immediately halted by a temporary writ of prohibition issued by the Supreme Court of Indiana. The Senate itself then resolved the dispute, as provided by Article 4, Section 10. In thereafter making the temporary writ permanent, instead of simply dismissing the proceeding as moot in light of the seating of Senator Batchelet, the Supreme Court again quoted from *Acker:* "(The) right of legislative bodies to judge the election, qualifications, and returns of their own members is of ancient origin. It is no more subject to judicial interference or control than the judicial functions of this court are subject to the dictates of the legislative or executive departments. The Constitution has defined a domain upon which courts may not tread." The lower court was held to have no jurisdiction.

If, as cannot possibly be denied, it is unconstitutional under Indiana law for an Indiana Circuit or Superior Court to conduct a recount for the office of member of the General Assembly, even after the passage of the abortive 1961 amendments, *a fortiori* it is manifestly repugnant to the Constitution of the United States for such a court to attempt to conduct a recount for the office of United States Senator, as to which office such amendments were not even sought to be applied.

We now return to further discussion of the effect, or lack of effect, of 28 U. S. C. § 2283. At the outset, it will be noted that the section contains three specific exceptions which remove the statutory inhibition in certain circumstances (Footnote 3). Obviously, if the suit at hand falls within one of the exceptions, no further discussion is required. It has been urged in recent cases arising under 42 U. S. C.

§ 1983[5] and brought pursuant to 28 U. S. C. § 1343 that Section 1983 itself furnishes a specific exception applicable to Section 2283, in that it specifically authorizes relief by "... suit in equity, or other proper proceeding for redress." Indeed, it has been so held. *Cooper* v. *Hutchinson*, 3 Cir., 1950, 184 F. 2d 119. In *Dombrowski, supra*, the Supreme Court found decision of this question unnecessary to its disposition of the case, and therefore declined to resolve it. It likewise specifically declined to resolve the question in *Cameron v. Johnson*, 390 U. S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182. The proposition therefore remains quite viable.

However, it is true that whether one takes the view of the Third Circuit as expressed in *Cooper* that Section 1983 constitutes a specific exception to Section 2283, or whether one takes the view we have adopted that notwithstanding Section 2283 a state court proceeding may be enjoined where special circumstances justify such relief, it does not follow that equitable relief will automatically be granted. Indeed, in some of the cases relied upon in support of each of the rules as above stated, refining the scope of Section 2283, injunctive relief was ultimately denied by reason of the application of principles of comity and the abstention doctrine. E.g., *Baines* v. *City of Danville, supra; Cooper* v. *Hutchinson, supra.*

The question involved here is one of federal constitutional law, and the state statute involved is not of an uncertain nature. Neither is the state statute susceptible of a limiting construction, because it has already been construed

5. Section 1983. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

three times by the Supreme Court of Indiana and thrice held unconstitutional. In such circumstances the abstention doctrine does not apply. *Harman* v. *Forsenius,* 380 U. S. 528, 85 S. Ct. 1177, 14 L. Ed. 2d 50; *Baggett* v. *Bullitt,* 377 U. S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377; *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440; *McNeese* v. *Board of Education,* 373 U. S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622; *City of Chicago* v. *Atchison, T. & S. F. R. Co.,* 357 U. S. 77, 78 S. Ct. 1063, 2 L. Ed. 2d 1174; *Spector Motor Service, Inc.* v. *McLaughlin,* 323 U. S. 101, 65 S. Ct. 152, 89 L. Ed. 101.

Just as the defunct legal posture of the Indiana recount statute makes clear that abstention is not appropriate, the special circumstances disclosed by the facts impel the conclusion that the active interposition of this Court is required. What defendants are threatening to do, and will do if not enjoined, constitutes an interference with the orderly processes of the recent election, and with the Constitutional prerogatives of the United States Senate. The plaintiff, as a candidate for re-election to that body, has a constitutional right to have the election contest, if there is to be one, held before the sole tribunal having jurisdiction in the premises, the Senate itself. It is essential to plaintiff's right that the integrity of the ballots cast at such election be preserved, i.e., that they be held in their original envelopes, with the seals intact, and that the integrity of the tally sheets, voting machines, and other paraphernalia of the election likewise be preserved until such time as they may be called for by the Senate, so that no question may arise as to the character of the evidence which the Senate will be called upon to judge. Plaintiff's rights will be irreparably harmed if such evidence is compromised, for which there can be no adequate remedy at law. The harm to be avoided will take place immediately, if not enjoined.

Like Humpty Dumpty, the seals on the ballots cannot be put back together again, if once destroyed, hence the frequent reason given for abstention—that all can be made right through state appellate procedures—does not apply.

We surmise that the defendant's argument here would be less heated if, for example, we had before us, instead of a purported recount commission appointed by the Superior Court of Marion County, a purported recount commission appointed by a Justice of the Peace of Beanblossom Township, Brown County, Indiana, directed by the Justice to open, inspect, and judge anew all of the ballots cast in the whole State for the office of United States Senator. But what would be the difference?

As was said by the Supreme Court of Indiana in *Beaman*, the statute involved was void *ab initio* and conferred no power upon any court to perform either a ministerial or a judicial act thereunder, as to "recounts" for legislative office. Consistently, therefore, there could be no difference at all between the legal standing of the defendant commissioners in this action, and the hypothetical Brown County commissioners. Thus considered, what we are here enjoining is not in any true sense a "proceeding" in a State court, but, more appropriately, a threatened invasion of the sanctity of the ballots by persons acting wholly without legal authority.

The respective motions to dismiss the action are therefore each denied, and a preliminary injunction will issue forthwith, as prayed for by the plaintiff, upon his giving bond as provided in Rule 65(c), F. R. C. P., in the penal sum of $5,000.00.

Dated this 19th day of December, 1970, as of December 17, 1970, at 5:45 P. M., pursuant to the oral announcement

of the Court's decision and order at the conclusion of the hearing on the prayer for a preliminary injunction.

/s/ WILLIAM E. STECKLER,
William E. Steckler,

/s/ S. HUGH DILLIN,
S. Hugh Dillin,
Judges of the United States District Court.

Certified, A true copy, Arthur J. Beck, Clerk, U. S. District Court, Southern District of Indiana.

/s/ JAS. R. TYRE,
Deputy Clerk.

UNITED STATES DISTRICT COURT
Southern District of Indiana,
Indianapolis Division.

VANCE HARTKE,
Plaintiff,
vs.
RICHARD L. ROUDEBUSH, SAMUEL J. WALKER, JOHN R. HAMMOND, DUGE BUTLER,
Defendants.

No. IP 70-C-694.

STEVENS, *Circuit Judge,* dissenting.

Regardless of whether or not we agree with the Indiana trial court's construction of Indiana law (and we should not substitute our interpretation of state law for his), we still must decide whether a federal court should enjoin a recount of votes cast for the office of United States Senator pursuant to state election laws. No federal court has ever done so before.

In my opinion the temporary restraining order was improvidently entered on December 3, 1970, and should be vacated. At that time the recount was not scheduled to commence until December 8, 1970. No explanation has been advanced for the failure to seek review in the Indiana Supreme Court, including a stay of the recount if needed to give that Court adequate time to consider all issues, both state and federal, subject to further review, if necessary, by the United States Supreme Court. See *United States ex rel. Lawrence* v. *Woods,* No. 18169, 7th Cir., October 19, 1970 (slip opinion, pp. 4-6). Nor has there been any suggestion that the Indiana judiciary is not perfectly

capable of handling Indiana litigation without assistance or interference from a federal district court. I think this court is prohibited from enjoining the recount by the plain language of 28 U. S. C. Section 2283, and Supreme Court opinions articulating the policy underlying that statute.[1] *Atlantic C. L. R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U. S. 281; *Amalgamated Clothing Workers* v. *Richmond Bros. Co.,* 348 U. S. 511.

Plaintiff asserts that an injunction should be granted to protect him from a deprivation of his constitutional right to have the United States Senate act as the sole judge of the Indiana election returns, U. S. Const., Art. I, Section 5. But the proof which he offered does not establish any threatened deprivation of that right. In my opinion the exercise of "judgment" by state election officials at various stages of the counting and recounting of ballots does not invade the Senate's power to make the final judgment on the outcome. The evidence establishes without contradiction that the Indiana recount procedures have integrity, that the original ballots and other records are carefully preserved for future study, that an adequate record of what transpires during a recount is maintained, and that any judgment as to whether or not certain categories of ballots (or even individual ballots) should be counted, may be reviewed subsequently by the body having the power finally to resolve an election contest.

Plaintiff has failed to prove that he would suffer irreparable harm if the recount were permitted to proceed. Indeed, it is entirely possible that the recount would show that a Senate contest would be futile, and thereby avoid a pro-

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1. I also think it was improper to enter the temporary restraining order without notice five days before the recount was scheduled to commence. In my opinion notice to the opposite party should always be required absent a compelling showing of need and a convincing explanation for the failure to give notice.

tracted controversy which may now be required. Moreover, as a practical matter, I would assume that the work of the Senate would be facilitated, rather than impaired, by the availability of a fairly conducted recount, in addition to the original count, before undertaking its work.[2]

I would vacate the temporary restraining order and dismiss the complaint.

2. We have not been advised about the Senate procedures for resolving election contests. It is of some interest that the House of Representatives "generally follows State law and the rulings of State courts in resolving election contests, . . ." See H. R. Rep. No. 513, 87th Cong., 1st Sess. 42 (1961). It would seem likely that the Senate would also rely on state practice. Indeed, I would expect the recount procedure, in contrast to making the final judgment in a contest, to be treated as part of the "Manner of holding Elections" covered by Section 4 of Article I. See U. S. Const., Art. I, Sec. 4.

APPENDIX B.

ORDER GRANTING INTERLOCUTORY INJUNCTION.

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division.

VANCE HARTKE, *Plaintiff*,
vs.
RICHARD L. ROUDEBUSH, SAMUEL J. WALKER, JOHN R. HAMMOND, DUGE BUTLER, *Defendants*,
THEODORE SENDAK, Attorney General of Indiana, *Intervening Defendant*.
No. IP 70-C-694

PRELIMINARY INJUNCTION.

This cause was heard before a three-judge District Court convened pursuant to 28 U. S. C. § 2284, on plaintiff's application for a preliminary injunction to enjoin the operation and enforcement of Chapter 54 of Title 29 of the Indiana Election Code, Burns Ind. Stat. Ann. § 29-5401 through § 29-5417, upon the ground that the application and operation of such statutes in respect to an election for the office of United States Senator is unconstitutional.

The Court having heard the evidence, and having considered the briefs and oral arguments of counsel, and it appearing to a majority of the Court after due deliberation that the defendant Richard L. Roudebush has sought and will continue to seek a recount of the votes cast in certain counties of the State of Indiana in the general election of November 3, 1970, for the office of United States Senator for the State of Indiana, if not enjoined from so doing, and it further appearing that the defendants Samuel J. Walker, John R. Hammond, and Duge Butler will proceed to recount the votes cast for said office at said election in certain precincts of Marion County, Indiana, if not so enjoined; and a majority of the Court having made and filed its written opinion holding said statute to be unconstitutional with respect to such office, and finding that for said defendants to proceed with a purported recount in Marion County, Indiana, or elsewhere, would work irreparable injury to the plaintiff in that such action would compromise the integrity of the ballots, tally sheets, voting machines, and other paraphernalia of the election upon which plaintiff must rely to justify his certification of election to such office, in the event the defendant Richard L. Roudebush contests the same before the United States Senate, as he threatens to do, it is therefore

ORDERED, that the defendants Richard L. Roudebush, Samuel J. Walker, John R. Hammond, Duge Butler and their officers, agents, servants, employees and attorneys and all those in active concert or participation with them, be and they are each hereby restrained and enjoined from taking any action whatsoever under and pursuant to the provisions of Burns Ind. Stat. Ann. § 29-5401 through § 29-5417 to conduct a recount for the office of United States Senator for the State of Indiana in Marion County, Indiana, or elsewhere, pending the determination of this action; provided, that plaintiff first give security in the sum of

$5,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined, such bond to be approved by the court or by the Clerk of the court;

IT IS FURTHER ORDERED, that the United States Marshal serve a copy of this preliminary injunction upon each of said defendants and make his due return hereon.

Dated this 19th day of December, 1970, but effective as of December 17, 1970, at 5:45 P. M., pursuant to the oral announcement of the court's decision and order at the conclusion of the hearing on the prayer for a preliminary injunction.

/s/ WILLIAM E. STECKLER,
William E. Steckler,
/s/ S. HUGH DILLIN,
S. Hugh Dillin,
Judges, United States District Court.

APPENDIX C.

NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division.

(FILED
U. S. District Court, Indianapolis Division
DEC 18 10:17 AM '70
Southern District of Indiana
Arthur J. Beck Clerk.)

VANCE HARTKE,
Plaintiff,
vs.
RICHARD L. ROUDEBUSH, SAMUEL WALKER, JOHN R. HAMMOND, DUGE BUTLER,
Defendants.

No. IP 70-C-694

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Notice is hereby given that defendant, Richard L. Roudebush hereby appeals to the Supreme Court of the United States from the order granting an interlocutory injunction entered in this action on December 17, 1970.

This appeal is taken pursuant to 28 U. S. C. § 1253.

/s/ JOHN G. TINDER,
John G. Tinder,
620 Union Federal Building,
Indianapolis, Indiana 46204,

/s/ DONALD A. SCHABEL,
Donald A. Schabel,
111 Monument Circle,
Indianapolis, Indiana 46204,
Attorneys for defendant Richard L. Roudebush.

CERTIFICATE OF SERVICE.

The undersigned, a member of the bar of the Supreme Court of the United States, hereby certifies that copies of the foregoing notice of appeal were served upon John J. Dillon, Suite 711, 120 East Market Street, Indianapolis, Indiana 46204, David W. Mernitz, 710 Guaranty Building, Indianapolis, Indiana, and James L. Tuohy, 301 Circle Tower Building, Indianapolis, Indiana 46204, attorneys for the plaintiff, and on Theodore L. Sendak, Attorney General, 219 State House, Indianapolis, Indiana 46204, intervening defendant, by delivery to such persons at their respective offices, and by mailing copies to Samuel Walker, 1604 East LeGrande Ave., Indianapolis, Indiana, John R. Hammond, 431 East Hanna Avenue, Indianapolis, Indiana, and to Duge Butler, 156 East Market Street, Room 400, Indianapolis, Indiana, defendants, this 18th day of December, 1970.

/s/ DONALD A. SCHABEL,
Donald A. Schabel.

APPENDIX D.

STATUTE INVOLVED—INDIANA ELECTION CODE.

Article 27—Recounting the Vote.

29-5401. Elections—Right of candidate to recount of votes.—Any candidate for any public office voted upon at any election held within the state of Indiana shall have the right to have the votes cast for the office for which he was a candidate recounted in any voting precinct or precincts in any county or counties, as the case may be, under the condition and in the manner and with the effect as in this article [§§ 29-5401—29-5417] provided. [Acts 1945, ch. 208, § 324, p. 680.]

29.5402. Right of recount—Candidates entitled—Application to voting precincts.—The right of recount provided in this article [§§ 29-5401—29-5417] shall be available to any candidate for any public office without exception and including specifically, but without limiting the generality of the foregoing, all candidates for any township, town, city, municipal, county, district, judicial, legislative, and state elective office and candidates for membership in the house of representatives and in the senate of the United States; and such right of recount may by any candidate be exercised with respect to one [1] or several or all of the voting precincts in which votes were cast for the office for which he was a candidate. [Acts 1945, ch. 208, § 325, p. 680.]

29-5403. Petition for recount—Verification—Filing—Cross-petition by candidate elected—Time in which cross-

petition must be filed.—The candidate desiring a recount of votes shall file a verified petition or petitions therefor, as the case may be, in the circuit or in a superior court of the county or counties in which is located or are located the voting precinct or precincts in which he desires a recount of the votes cast for the office for which he or she was a candidate at such election, or before the judge of any such court in vacation and each such petition shall specify the voting precinct or precincts within the county in which the petition is filed in which such recount is desired; such petitions for the recount of votes cast at an election shall be filed within fifteen [15] days after the day on which such election was held: Provided, That any candidate, who, on the face of the election returns is elected to any office at such election, shall be permitted to file a cross-petition or cross-petitions for a recount within twenty-five [25] days after the day on which said election is held and each such cross-petition shall specify the voting precinct or precincts within the county in which the cross-petition is filed in which such recount is desired. If a petition for recount is filed for an office for which voters in more than one county vote a cross-petition for a recount may be filed in a county or counties in addition to the one in which the first petition was filed: Provided, That such cross-petition or cross-petitions for a recount shall be filed within twenty-five [25] days after the day on which said election is held and that such cross-petition or cross-petitions shall ask for a recount of all votes cast for such office in the second or more counties; Provided, further, That in the case of a state-wide elective office, if more than two [2] counties are involved through petition or cross-petition, the petitioner and cross-petitioner shall each bear ten per cent [10] of the costs occasioned by the recount and the remainder of said cost shall be appropriated and paid from the general fund as other expenditures of the state of

Indiana, notwithstanding any other provisions of the Acts of 1945, chapter 208. If on either such day the court shall be in vacation the petition or cross-petition shall be deemed duly filed in time if filed in the office of the clerk of the court, but no such petition shall be granted and no recount ordered until after such twenty-fifth day following such election unless the defendant or defendants to the petition or petitions file a written waiver or waivers of their right to file a cross-petition or cross-petitions as provided in this article [§§ 29-5401—29-5417]: Provided, further, That the filing of a cross-petition is discretionary and not obligatory and failure to file either a cross-petition or an answer shall not be construed as an admission of the truth of the allegations of the petition for a recount nor shall it give rise to any presumption in favor thereof. [Acts 1945, ch. 208, § 326, p. 680; 1961, ch. 313, § 2, p. 861.].

29-5404. Candidates may join in petition for recount—Consolidation of petitions for recount.—Two [2] or more candidates for the same or different offices voted upon at the same election may join in such petition or petitions for recount. If more than one [1] petition for recount is filed in any county within fifteen [15] days following an election, whether in the same court of such county or not, such petitions shall be ordered consolidated under the petition first filed, and if a transfer of petitions from one court of such county to another court of such county is necessary to effect such consolidation such transfer shall on motion be ordered by the court in which the subsequent petition or petitions were filed, or the judge thereof in vacation. [Acts 1945, ch. 208, § 327, p. 680.]

29-5405. Petition for recount—Contents—Term "contest" defined—Amendment of petition.—Each such petition shall state the office and the precinct or precincts within the county in respect of which the petitioner desires a recount; that he was a candidate at such election for such

office and that the office was voted upon in the precinct or precincts specified; the name and post-office address of petitioner's opposing candidate or candidates; that the petitioner in good faith believes that either through mistake or fraud the votes cast for such office at such election in such precinct or precincts were not correctly counted and returned; that the petitioner desires to contest said election in respect of said office, or that the petitioner desires to prepare for a contest in respect of such office which he has reason to believe will be instituted against him; and that he desires a recount of all of the votes cast for such office in such precinct or precincts. The term "contest" as used in this section shall includes all forms of contest herein or hereafter recognized as appropriate means for contesting title to a public office. The court in which such petition is filed or the judge thereof in vacation may allow such petition to be amended at any time upon such terms and conditions as the court or judge may order. [Acts 1945, ch. 208, § 328, p. 680.]

29-5406. Cross-petition—Contents—Amendment of cross-petition.—Each such cross-petition shall state the office and the precinct or precincts within the county in respect of which the cross-petitioner desires a recount; that he was a candidate at such election for such office and that the office was voted upon in the precinct or precincts specified; the name and post-office address of the cross-petitioner's opposing candidate or candidates; that the cross-petitioner in good faith believes that either through mistake or fraud the votes cast for such office at such election in such precinct or precincts were not correctly counted and returned; that he desires a recount of all of the votes cast for such office in such precinct or precincts. The court in which such cross-petition is filed or the judge thereof in vacation may allow such cross-petition to be amended at any time upon such terms and conditions as the court or judge may order. [Acts 1945, ch. 208, § 329, p. 680.]

29-5407. Notice of filing and pendency of petition—Duty of clerk to issue notice—Duty of sheriff.—Upon the filing of such petition, the clerk shall issue a notice of such filing and pendency of such petition to the opposing candidate or candidates and deliver the same to the sheriff or sheriffs of the county or counties in which such opposing candidate or candidates reside; and said sheriff or sheriffs shall immediately serve the same upon such opposing candidate or candidates in person or by leaving a copy at his or their last and usual place of residence and shall make immediate return of such service. [Acts 1945, ch. 208, § 330, p. 680.]

29-5408. Bond for payment of costs.—Each petitioner shall furnish a cash deposit or file an undertaking with corporate surety to the approval of the court for the payment of all costs of such recount, the minimum amount of which shall be one hundred [$100] dollars. Should the number of precincts to be counted exceed ten [10], the amount of the deposit or bond, as the case may be, shall be increased by ten dollars [$10] for each and every precinct in excess of ten [10]. Any unexpended balance remaining in any deposit after payment of all the costs occasioned by the recount proceedings shall be returned to the depositor: Provided, That where the petition is joint a joint undertaking may be furnished: Provided, however, That in the event a cross-petition is filed then the petitioner or petitioners and the cross-petitioner or cross-petitioners shall either furnish cash deposits or file undertakings with corporate surety to the approval of the court for the payment of his or their proportionate share of the cost of such recount as hereinafter provided: Provided, That where the cross-petition is joint a joint undertaking may be furnished. [Acts 1945, ch. 208, § 331, p. 680.]

29-5409. Granting petition and cross-petition.—Appointment of recount commission.—Upon the filing of such petition and undertaking, the court or the judge thereof in

vacation shall, upon the expiration of twenty-five [25] days after such election and upon proof of service of said notice or notices, grant such petition and cross-petition or cross-petitions as may have been filed and order the recount of such votes in such precinct or precincts, and if there is a consolidation of such petitions and cross-petitions, the court shall by consolidated order grant such consolidated petitions and cross-petitions and shall order a consolidated recount of all votes in all precincts in such county specified and requested in such petitions and cross-petitions. In either case the court or the judge thereof in vacation shall appoint a recount commission of three [3] members to make the recount or recounts ordered, and the commission shall in the same process recount all of the votes ordered recounted. [Acts 1945, ch. 208, § 332, p. 680.]

29-5410. Recount commission—Qualifications of members—Compensation.—If any of the votes to be recounted were cast by means of voting machines, one [1] member of the recount commission shall be a competent mechanic who is familiar with such voting machines. All of such commissioners shall be voters, qualified to vote at such election and two [2] of such commissioners shall be selected from the two [2] opposite political parties which cast the highest and next highest votes in this state for secretary of state at the last preceding general election. Each member of the commission shall receive ten dollars [$10.00] for each day while actually engaged in making such recount. The cost of such recount shall be paid by each petitioner or cross-petitioner, as hereinafter provided. [Acts 1945, ch. 208, § 333, p. 680.]

29-5411. Duty of commission—Watchers—Representatives of press entitled to attend.—On a day, not sooner than five [5] days after the recount is ordered, and at a place to be fixed by order of the court, such commission shall convene and commence such recount and shall expeditiously

complete the same. Each candidate affected by such recount shall be entitled to have a watcher present at such recount and shall himself have the right to be present. Representatives of the press shall also be entitled to attend such recount [Acts 1945, ch. 208, § 334, p. 680.]

29-5412. Duty of clerk when order of recount is made and entered by court.—On the day when the order of recount is made and entered by the court, the clerk of the circuit court shall, by registered United States mail, mail a certified copy of such order to each opposing candidate named in such petition at the address therein given, and shall tax the cost thereof to the petitioner. [Acts 1945, ch. 208, § 335, p. 680.]

29-5413. Protection of ballots, voting machines, tally sheets and other papers—Duty of court.—The court shall by order impound, and provide for the protection of all ballots and voting machines used at such election for casting votes for such office or offices in such precinct or precincts, together with all tally sheets relating thereto and all lists of the names and addresses of all persons registered by the clerk as having voted for such office or offices, and shall make the same available to said recount commission or to any contest commission appointed pursuant to section 351 [§ 29-5603] (a) (b) and (c) of this act [chs. 28-60 of this title]. [Acts 1945, ch. 208, § 336, p. 680; 1961, ch. 313, § 3, p. 861.]

29-5414. Completion of recount—Certificate of commission—Filing—Duty of clerk—Effect of certificate—Procedure when recount for office of governor, lieutenant-governor, and members of general assembly.—When such recount is completed by the commission it shall make and sign its certificate showing the total number of votes received in such precinct or precincts by each candidate for such office or offices and state therein who received the

highest number of votes in such precinct or precincts for such office or offices and by what plurality, and shall file the same with the clerk of the circuit court. The clerk shall enter such certificate in the order book of such court.

Except for the offices of governor, lieutenant-governor, and members of the general assembly, such recount certificates shall supersede for all purposes all previous returns made in any form of the votes thus recounted; and certified copies of such recount certificates shall be prima facie evidence of the votes cast for such office or offices in such precinct or precincts in any contest or other preceeding [proceeding] in which there is an issue as to the votes cast at such election for such office or offices.

Upon a recount for the office of governor or lieutenant-governor, each clerk of the circuit court shall, on the day following the completion of the recount, make out, at full length, two [2] certified statements, under the seal of the clerk of the circuit court, of the number of votes each candidate received; one [1] of which he shall transmit to the speaker of the house of representatives of the next general assembly, by its senator or representative, who shall deliver the same to such speaker on the first day of the session and the other certified statement shall be transmitted by registered mail to Indianapolis, directed to said speaker, and to the care of the secretary of state, by whom the same shall be delivered to the speaker on the first day of the session.

If a recount is had in respect to votes cast for senator or representative in the general assembly, each clerk of the circuit court, on the day following the completion of the recount, shall make and certify two [2] statements showing the total number of votes each candidate received; he shall transmit one [1] such certified statement to the person having the highest number of votes for senator or representative, and shall transmit one [1] certified statement

to the presiding officer of the house in which the successful candidate is to be seated, directed to the care of the secretary of state, by whom the same shall be delivered to the said presiding officer on the first day of the next session of the general assembly. The said certified statement shall be referred by such presiding officer for such action as that body may find appropriate: Provided, however, That when two [2] or more counties compose a district to elect a senator or representative, the clerks of such counties shall meet on Wednesday next following the day such recount is completed between the hours of one [1] and six [6] of the afternoon, at the courthouse of the oldest county in such district, where they shall compare the recount certificates filed with them and shall jointly make out and certify two [2] statements showing the total number of votes each candidate received and shall transmit the same as provided herein.

The said certified statements of the clerks of the circuit courts shall not be construed as determining the eligibility of a candidate for office, but shall be prepared and transmitted as herein provided for the purpose of referring the information therein contained to the appropriate authorities. [Acts 1945, ch. 208, § 337, p. 680; 1961, ch. 313, § 4, p. 861.]

29-5415. Recount in respect to office for which votes were cast in all voting precincts of state—Duty of clerk to certify recount vote to secretary of state—Duty of secretary of state.—If a recount is had in respect to an office for which votes were cast in all voting precincts of the state, except governor and lieutenant-governor, or in more than one [1] county, except members of the general assembly, the clerk of the circuit court where such recount was had shall determine whether the votes as shown by such recount certificates differ from the votes in such precinct or precincts as the same had been returned to, and tabulated by

the county canvassing board, and if he finds there is such difference he shall make his certificate showing the total vote in such county for such office for each candidate as corrected in accordance with the votes shown by such recount certificate and shall forthwith transmit the same to the secretary of state who then shall tabulate the vote for such office from such county in accordance with such certificate from such clerk; and if the secretary of state shall previously have included in his tabulations votes cast for such office as returned by such county canvassing board he shall correct such tabulation, in accordance with such certificate from such clerk and the candidate shown by such corrected tabulation to have received the highest number of votes for such office shall be entitled to a certificate of election or commission for such office notwithstanding one may have been issued upon a previous tabulation of the total votes cast for such office. [Acts 1945, ch. 208, § 338, p. 680; 1961, ch. 313, § 5, p. 861.]

29-5416. Recount in respect to office voted upon in single county, city or smaller unit—Duty of clerk.—If the office in respect to which such recount is had was voted upon only in a single county, except members of the general assembly, city, or smaller unit, then the clerk of the circuit court shall determine whether the total tabulation of all votes for such office as made by the county canvassing board authorized to make such total tabulation is affected by the results of such recount as shown by such recount certificate, and if it is, then such clerk shall make his certificate showing the correct total vote for such office in accordance with such recount certificate and shall transmit such certificate to the county election board or such other officer as may be authorized by this act [chs. 28-60 of this title] to issue a certificate of election or commission for such office; and the candidate shown by such certificate of the clerk to have received the highest number of votes for such office shall

be entitled to a certificate of election or commission for such office, notwithstanding one may have been issued upon a previous return or certificate of the total votes cast for such office. [Acts 1945, ch. 208, § 339, p. 680; 1961, ch. 313, § 6, p. 861.]

29-5417. Payment of costs of recount—Time.—In those cases in which no cash deposit is made as provided in section three hundred and thirty-one [§ 29-5408], the petitioner or petitioners shall pay all of the costs occasioned by the recount to the clerk of the circuit court within ten [10] days after the recount has been finally completed: Provided, however, That in the event a cross-petition or cross-petitions are filed then the party or parties filing such cross-petition or cross-petitions shall pay to the clerk of the circuit court of the county in which such recount is had within ten [10] days after the recount is completed all of the costs occasioned by the recount of votes in the precinct or precincts which have been designated in his or their respective cross-petition or cross-petitions and the petitioner or petitioners shall be relieved of these costs of the recount. [Acts 1945, ch. 208, § 340, p. 680.]

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Supreme Court, U.S.
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IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

NO. [redacted]

THEODORE L. SENDAK
Attorney General of the
State of Indiana,

Appellant,

v.

R. VANCE HARTKE,
(Plaintiff Below)
RICHARD L. ROUDEBUSH
SAMUEL WALKER
JOHN R. HAMMOND
DUGE BUTLER
(Defendants Below) *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA,
INDIANAPOLIS DIVISION

JURISDICTIONAL STATEMENT

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NO.

THEODORE L. SENDAK
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State of Indiana,

Appellant.

v.

R. VANCE HARTKE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA,
INDIANAPOLIS DIVISION

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division, entered on December 17, 1970, granting Appellee a preliminary injunction which continued in full force the *ex parte* temporary restraining order entered by the District Court on December 3, 1970, enjoining any action to conduct a recount in the election for the office of United States Senator for the

State of Indiana. Appellants submit this statement to show that this Court has jurisdiction of the appeal and that a truly substantial question is presented.

OPINION BELOW

The opinion of the District Court is unreported. The decision, and opinion, of the court is appended to this Statement at p. A-1.

JURISDICTION

This action for injunctive relief was brought in the District Court on December 3, 1970, pursuant to 28 U.S.C. § 1343(3) to enjoin the holding of an election recount on the ground that the Indiana election recount statutes were in conflict with the United States Constitution. The three judge panel entered its order December 17, 1970, continuing in full force an earlier temporary restraining order granted by the District Court December 3, 1970 which enjoined the conduct of the recount. Appellant's Notice of Appeal was filed December 18, 1970 in the District Court, Indianapolis. The Notice of Appeal is appended at p. A-22. This Court has jurisdiction of this appeal under 28 U.S.C. § 1253.

The Attorney General of Indiana was granted leave to intervene as a party defendant by the District Court on December 15, 1970. See Appendix, p. A-21. Indiana law requires the Attorney General to appear and defend the constitutionality of Indiana statutes when attacked on constitutional grounds. Acts of 1889, ch. 71, § 4; Acts of 1921, ch. 85, § 2, the same being Burns' Indiana Statutes (1964 Repl.) § 49-1902 and Acts of 1927, ch. 81, § 11, being Burns' (1968 Repl.) § 3-1111. Federal law also recognizes the propriety of the Attorney General

appearing to defend the constitutionality of state statutes when challenged. 28 U.S.C. 2284(2).

The statutes attacked as unconstitutional in this case are those included under the Indiana Election Code involving the right to recount, Acts of 1945, ch. 208, §§ 324-340, being Burns' (1969 Repl.) §§ 29-5401-5417. Generally this election code provides:

> "Any candidate for any public office voted upon at any election held within the State of Indiana shall have the right to have the votes cast for the office for which he was a candidate recounted in any voting precinct or precincts in any county or counties, as the case may be, under the conditions and in the manner and with the effect as in this article provided." Acts 1945, ch. 208, § 324; Burns' § 29-5401.

The right to a recount is available to all candidates:

> "The right of recount provided in this article [§§ 29-5401—29-5417] shall be available to any candidate for any public office without exception and including specifically, but without limiting the generality of the foregoing, all candidates for any township, town, city, municipal, county, district, judicial, legislative, and state elective office and candidates for membership in the house of representatives and in the senate of the United States; and such right of recount may by any candidate be exercised with respect to one [1] or several or all of the voting precincts in which votes were cast for the office for which he was a candidate." Acts 1945, ch. 208, § 325, p. 680.

The entire recount statute is set out at p. A-25 of the Appendix.

The most relevant part is § 29-5414, which provides the effect of a recount: